DECISION OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-192295 DATE: November 1, 1978

MATTER OF: Douglas C. Butler - Retroactive Promotion

DIGEST: Employee grieved due to delay in processing promotion papers. Grievance Examiner found that although promotion papers reached personnel office and were acted upon by classification officers prior to beginning of new pay period, grievant's papers were not approved by Personnel Officer until after beginning of new pay period. Grievance Examiner concluded that classification officer acted for Personnel Officer and ordered retroactive promotion. Award may not be implemented since agency regulations delegate authority to approve promotions to Personnel Officer and he has not further delegated that authority in writing.

This action is at the request of Leonard L. Nahme, Director, Office of Finance, U.S. Patent and Trademark Office, Department of Commerce, for an advance decision concerning their authority to implement a grievance decision awarding a retroactive promotion to an employee of that office, Douglas C. Butler.

Mr. Butler was one of three employees who were recommended for promotion to grade GS-13 Patent Examiner. While their promotion papers were logged in the Personnel Office on the same day, the effective dates of the promotions varied in that one was effective on January 16, 1977, and the other two were effective on January 30, 1977. The two employees whose promotions were made effective on January 30, 1977, filed grievances to have the effective dates made retroactive to January 16, 1977.

In a "Decision on Formal Grievance" dated March 29, 1978, the Deciding Official, the Deputy Assistant Commissioner for Patents, decided in favor of Mr. Butler. The essential portion of his decision is set forth below:

> "Under the circumstances of this case, I agree with the Grievance Examiner that the approval of the promotion by the classification

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officer must be deemed to be the act of the Personnel Officer and hence of the authorizing official. The record in this grievance file shows that the promotion of Charles E. Frankfort was approved by Classification Officer Smith on January 18, 1977, whereas the promotion of Douglas C. Butler was approved by Classification Officer Jeter on January 12, 1977. Since January 16, 1977 is the proposed effective promotion date, it is apparent that the Patent and Trademark Office does not have authority to authorize a retroactive promotion to Charles E. Frankfort because his promotion was not approved by the authorized official prior to the proposed effective promotion date. Moreover, I am not aware of any nondiscretionary agency regulation, policy or collective bargaining agreement provision or right granted by statute which mandates that promotion take place by a specific date which would also authorize retroactive promotion."

Since a retroactive promotion was not recommended for Mr. Charles E. Frankfort, no further consideration will be given here to his attempt to obtain a retroactive promotion.

Mr. Nahme questions whether it is proper to grant backpay to Mr. Butler for the period January 16-30, 1977, as required by the grievance award. He states that while the Grievance Examiner found that the Classification Officer had approved Mr. Butler's promotion on January 12, 1977, the record shows that the Personnel Officer did not approve the promotion until January 30, 1977. Mr. Nahme argues that the authority for final approval of promotions had not been delegated to the Classification Officer. He states that:

"Department of Commerce Administrative Order (DOC AO) 202-250, entitled 'Delegation of Authority for Personnel Management' sets forth those DOC officials to whom authority for personnel management is delegated. Appendix A to this agency regulation notes that this authority has been delegated to the following:

"'Commissioner
Deputy Commissioner
Assistant Commissioners (statutory)
Assistant Commissioner for Administration
Personnel Officer'

"The approval authority for personnel actions including promotions is also set forth in DOC AO 202-250 and in pertinent part states:

"SECTION 4. FINAL APPROVAL OF PERSONNEL ACTIONS.

".01 Personnel actions involving accessions, changes in employment status, and separations of employees will become legally valid on the effective date specified on CD-251, 'Notification of Personnel Action,' or other document specified by the Civil Service Commission or General Accounting Office for a similar purpose, upon approval (individually or on 'cover sheets') of the CD-251 or equivalent documents, or other document approved by the Director of Personnel, by one of the appointing officers listed in Appendix A of this order, or by some other person to whom authority has been delegated under paragraph 3.01 of this order...(Emphasis added).

"As indicated above, some other person in addition to those noted in Appendix A may have delegated authority to approve personnel actions. This authority has not been so delegated to other persons."

As a general rule a personnel action may not be made retroactive so as to increase the rights of an employee to compensation. We have made exceptions to this rule where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation. See 55 Comp. Gen. 42 (1975); 54 id. 888 (1975), and decisions cited therein. The parties agree that the second and third exceptions are not applicable to this case.

With respect to delays or omissions in processing of promotion requests that will be regarded as administrative or clerical errors that will support retroactive promotion, applicable decisions have drawn a distinction between those errors that occur prior to approval of the promotion by the properly authorized official and those that occur after such approval but before the acts necessary to effective promotions have been fully carried out. See 54 Comp. Gen. 538 (1974); B-183969, July 2, 1975; and B-184817, November 28, 1975. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such request unless his exercise of disapproval authority is otherwise constrained by statute, administrative policy, or regulation. Thus, where the delay or omission occurs before that official has had the opportunity to exercise his discretion with respect to approval or disapproval, administrative intent to promote at any particular time cannot be established other than by after-the-fact statements as to what that official states would have been his determination. After the authorized official has exercised his authority by approving the promotion request, all that remains to effectuate that promotion is a series of ministerial acts which could be compelled by writ of mandamus.

In the instant case the Grievance Examiner found that the act of the Classification Officer must be deemed to be the act of the Personnel Officer, and that finding was approved by the deciding official. Such a finding is tantamount to finding that the Classification Officer was an official having been delegated the authority to approve promotions. The Department of Commerce Administrative Order DOC AO 202-250, section 4 provides that approval of personnel actions may be exercised by one of the officials listed in Appendix A of that order or "* * * by some other person to whom authority has been delegated under paragraph 3.01* * *." Paragraph 3.01 is set forth below:

> "Authority is hereby further delegated to officers and employees who are listed in Appendix A of this order, and to such other employees of the Government as may be specified in this order or designated or approved by the Director of Personnel in writing, to administer and conduct

personnel management activities and process personnel actions in both the Department and Field Service, subject to the limitations and authorizations outlined in this order." (Emphasis added.)

The other provisions of the order are not capable of being interpreted as delegating to the Classification Officer the authority to approve promotions. Thus, unless the Director of Personnel has made the delegation in writing as required by DOC AO 202-250, section 3.01, the grievance award would be in violation of valid agency regulations and, as such, unenforceable. B-180010.11, March 9, 1977. Mr. Nahme on behalf of the agency states that no further delegations were made.

Accordingly, since there exists no administrative error which would form the basis for a retroactive promotion, we hold that the grievance award may not be implemented.

R.F. Keller

Deputy Comptroller General
of the United States

warrant officers, and enlisted men of the reserve forces. Significantly, although the first paragraph of section 15 refers to retired officers, 56 Stat. 367, warrant officers, nurses, and enlisted men, the fourth paragraph of that same section refers only to any officer, etc. It is thus apparent that the term "officer" as used in the fourth paragraph, section 15 of the Pay Readjustment Act of the 1942, properly may not be viewed as including warrant officers.

In our decision dated July 5, 1956, B-127118 (copy herewith), to the Secretary of Defense, we held (quoting from the syllabus, 36 Comp. Gen. 8) that:

> An enlisted member of the uniformed services who is retired for physical disability and determined to be eligible for retired pay computed on the basis of a commissioned officer rank or grade, pursuant to section 402 and 409 of the Career Compensation Act of 1949, does not have his enlisted status terminated and is not to be considered as an officer at the time of retirement for the computation of retired pay pursuant to the fourth paragraph of section 15 of the Pay Readjustment Act of 1942. 37 U. S. C. 115.

The rule of that case has equal application to Colonel Jakway, whose status as a chief warrant officer (W-3) of the Regular Air Force was not terminated solely by reason of the fact that upon his retirement for physical disability under authority of Title IV of the Career Compensation Act of 1949 (with entitlement, under the second proviso of section 402(d), 63 Stat. 818, to disability retired pay computed on the basis of a higher temporary grade or rank than that held by him on February 29, 1956) he also became entitled under section 409 of the act, 63 Stat. 823, 37 U. S. C. 279, to the rank or grade of colonel on the retired list.

Accordingly, since the provisions of the fourth paragraph of section 15 of the Pay Readjustment Act of 1942 may not be applied in Colonel Jakway's case, the action taken October 16, 1957, in disallowing his claim is sustained.

37-492

[B-134820]

Classification—Reclassification—Administrative Action

When the Civil Service Commission prepares and publishes revised standards for positions as required under section 401 of the Classification Act of 1949, 5 U. S. C. 1094, it is mandatory that the administrative agency take action within a reasonable time to place the existing positions in the proper classes and grades prescribed in the revised standards and to pay the scheduled salaries of the grades, notwithstanding that the current appropriation estimates did not include the increased cost resulting from the application of the new standards.

The holding in 30 Comp. Gen. 156 that departmental actions under section 502 of the Classification Act of 1949, 5 U. S. C. 1102, shall form the basis for payment of compensation and that such changes become effective on the date administrative action is taken to finally allocate or reallocate the positions or such later date as might be administratively fixed, is amplified to the extent that such later date as might be administratively fixed must be within a reasonable time.

To the Secretary of Agriculture, January 24, 1958:

On January 6, 1958, the Assistant Secretary requested our decision whether administrative action reclassifying positions to conform with revised standards published by the Civil Service Commission is mandatory under applicable provisions of the Classification Act of 1949, 63 Stat. 954, 5 U. S. C. 1071 note.

Briefly the circumstances related in the submission show that some years ago your Department called to the attention of the Civil Service Commission the problems encountered in the interpretation of the existing published standards for meat inspection positions and the inequities resulting therefrom which caused many complaints from dissatisfied employees. Your Department points out that after exhaustive studies by your Department and the Civil Service Commission, over a long period of time—1952 to 1957—the Commission finally, in June 1957, published the revised standards for meat inspection positions. Based upon the published revised standards administrative action was taken effective October 6, 1957, reclassifying existing positions in accordance with such standards.

Specifically, your questions are presented as follows:

(1) whether the action taken by the Department in using funds appropriated under the 1958 Agricultural Appropriation Act for paying costs resulting from the reclassification of positions in the Meat Inspection Division was in accordance with the applicable statutes and regulations.

(2) If the Department was without authority to place in effect the revised standards, will it be necessary now to rescind the action taken and recover the amounts already paid to the employees?

Section 401 of the Classification Act of 1949, 63 Stat. 957, 5 U. S. C. 1094, provides in pertinent part, as follows:

Sec. 401. (a) The Commission, after consultation with the departments, shall prepare standards for placing positions in their proper classes and grades. The Commission is authorized to make such inquiries or investigations of the duties, responsibilities, and qualification requirements of positions as it deems necessary for this purpose. In such standards the Commission shall (1) define the various classes of positions that exist in the service in terms of duties, responsibilities, and qualification requirements; (2) establish the official class titles; and (3) set forth the grades in which such classes have been placed by the Commission. At the request of the Commission, the departments shall furnish information for and cooperate in the preparation of such standards. Such standards shall be published in such form as the Commission may determine.

(b) The Commission shall keep such standards up to date. From time to time, after consultation with the departments to the extent deemed necessary by the Commission, it may revise, supplement, or abolish existing standards, or prepare new standards, so that, as nearly as may be practicable, positions existing at any given time within the service will be covered by current published standards.

House Report No. 1264, 81st Congress, states as follows regarding section 401:

This section *authorizes* and *directs* the Civil Service Commission to prepare, publish, and keep up to date allocation standards; i. e., written standards for placing individual positions in their proper classes and grades. * * *

> The provisions of this section cover the standards-setting authority the Commission already has in the departmental service by statute and in the field service by Executive Order. [Italics supplied.]

Under the language of the foregoing section and the statement in the legislative history concerning that section, the Civil Service Commission is required to prepare standards for placing positions in their proper classes and grades and to keep such standards up to date so that existing positions will be covered by current published standards.

Under section 302 (a), of the Classification Act of 1949, 63 Stat. 957, 5 U. S. C. 1092 (a), each position is required to be placed in its appropriate class based upon the duties and responsibilities of such position and the qualifications required by such duties and responsibilities. Paragraph (b) of the same section, 63 Stat. 957, 5 U. S. C. 1092 (b), requires that each class shall be placed in its appropriate grade based upon the level of difficulty, responsibility, and qualification requirements of the work of such class. House Report No. 1264 also contains a statement respecting section 302, 5 U. S. C. 1092, which reads as follows:

> This section requires that each position be placed in the appropriate class, and that each class be placed in its appropriate grade, on the basis of duties, responsibilities, and qualification requirements of the work involved in the position or in the class of positions concerned.

It is apparent from the provisions of section 302 (a) and (b) and the statement in the legislative history that positions shall be placed in their appropriate classes and grades.

Section 502 (a), 63 Stat. 958, 5 U. S. C. 1102 (a) provides in pertinent part, that "each department shall place each position under its jurisdiction and to which this Act applies in its appropriate class and grade in conformance with standards published by the Commission." Concerning section 502, House Report No. 1264 states, in pertinent part, as follows:

> This section sets forth the ordinary day-by-day authority and procedure. Following the standards provided for in title IV, the department concerned is *required* to place its positions in proper classes and grades. The department's actions will be official for *pay* and *personnel purposes*, without prior approval of the Commission * * *. [Italics supplied.]

Section 504 (a), 63 Stat. 959, 5 U. S. C. 1104 (a), provides, in pertinent part, that:

> Whenever the Commission finds that any department is not placing positions in classes and grades in conformance with or consistently with published standards, it may revoke or suspend in whole or in part the authority granted to the department under section 502 * * *.

House Report No. 1264 contains the following statement respecting section 504:

> This section authorized the Commission to revoke or suspend in whole or in part the authority of a department to place positions in classes and grades without prior approval of the Commission, whenever the Commission finds that the department is not following the Commission's standards. After such revocation or suspension, the Commission may restore such authority to the extent that corrective measures taken by the department satisfy the Commission that subsequent actions will be in accordance with standards.

From the language of sections 502 (a) and 504 (a) and the statements in the legislative history concerning those sections, it is apparent that each department concerned is required to place each position under its jurisdiction and to which the act applies in its appropriate class and grade in conformance with standards published by the Commission or that in their refusal to act the Commission will take the action on its own initiative.

Section 603 (a), 5 U. S. C. 1113 (a), provides, in pertinent part, as follows:

> * * * the rates of basic compensation with respect to officers, employees, and positions to which this Act applies shall be in accordance with the schedules of per annum rates * * *.

Thus, if a position is reclassified to a higher grade, the incumbent becomes entitled to the scheduled compensation provided for such higher grade.

Based upon the foregoing statutory provisions and what has been said in the legislative history concerning them, we conclude that it is mandatory that administrative action be taken to place existing positions in proper classes and grades prescribed by revised standards published by the Civil Service Commission and to pay the scheduled salaries of the grades. The administrative action is to be taken within a reasonable time after publication of such standards, otherwise the provisions of section 504 (a) would be applicable. Therefore, your first question is answered in the affirmative making an answer to your second question unnecessary.

Our decision, 30 Comp. Gen. 156, holding that actions by departments—under section 502—shall form the basis for payment of compensation and that such changes become effective on the date administrative action is taken by the administrative officer vested with proper authority to finally allocate or reallocate the positions or such later date as might be administratively fixed, is amplified to the extent that such later date as might be administratively fixed must be within a reasonable period of time.

[B-134233]

Contracts—Specifications—Descriptive Data—Invitation *v.* Contract Requirement

Under an invitation which requires the submission of descriptive data and under a contract which does not incorporate the descriptive data but merely requires the furnishing of equipment of any reputable manufacturer provided the specifications are met, an award to the low bidder who submits descriptive data of a particular manufacturer but who intends to furnish equipment of another manufacturer results in a valid contract, and the contractor is not required to furnish equipment of the same manufacturer as that illustrated in the descriptive data but only equipment of a reputable manufacturer provided it meets the specifications.

on vehicles used in law enforcement activities. It was held therein that while such items might only incidentally affect the comfort and convenience of the passengers, they were essential to the "efficient operation of the vehicle" and consequently the cost of such items must be charged against the statutory limitation.

The prescribed limitation is on the cost of a passenger carrying vehicle completely equipped for operation. The statute makes no mention of the use to be made of the vehicle, whether to carry passengers or to carry materials. The station wagons here involved are not now fully equipped to perform the function for which they were purchased and in order for them to be "completely equipped for operation" it is necessary to install air-conditioning equipment. Furthermore, such equipment would be permanently installed, would become a part of the vehicles, would enhance their value and would affect the comfort and convenience of the passengers. Under these circumstances it is our conclusion that the air-conditioning equipment may not be installed on the station wagons since its cost, together with the original cost of the vehicles, will be more than $1,950.

[B-144022]

Civilian Personnel—Training Agreements—Promotions—Retroactive

Employees who were hired with the oral understanding that pursuant to training agreements they would be promoted at stated intervals following the successful completion of training courses but who, due to administrative delay, did not receive the promotions on the dates specified do not have an enforceable contractual right to promotions on the specified dates under the agreements which were more in the nature of agency policy rather than a firm commitment; therefore, the action of the agency in processing retroactive promotions for the employees is in contravention of the long-standing rule that a personnel action may not be made retroactively effective to increase the right of an employee to compensation.

To D. C. Lynch, General Services Administration, October 11, 1960:

On September 19, 1960, you requested our decision whether you may certify for payment a voucher in favor of G. W. Aitken and R. L. Troth, employees of the Public Buildings Service, General Services Administration, for additional compensation from July 10 to September 3, 1960, part of which period involves retroactive promotions.

Mr. Aitken and Mr. Troth were employed in June 1958 as GS-5 engineers under a training agreement which provided that employees within its scope, who entered the service at grade GS-5, would be promoted to grade GS-7 upon completion of six months' intensive training and that 12 months thereafter they would be promoted to

grade GS-9 and receive a second six months of training, and that upon satisfactory completion of the second period of training they would be promoted to grade GS-11. Each of the above promotions was dependent upon the finding of a panel of evaluators that the employees had satisfactorily completed all previous training. Six months after appointment, the employees involved received their promotions to grade GS-7. Although they began the second period of training 12 months later (December 1959), they were not promoted to grade GS-9 until March 20, 1960, because of administrative delay in processing such promotions. On June 29, 1960, the panel of evaluators certified that both employees had satisfactorily completed the six months of training in GS-9. On August 8, the Civil Service Commission was asked to approve the retroactive promotion of Mr. Aitken and Mr. Troth effective July 10. The Commission approved of such promotion on August 11, subject to the proviso:

Retroactive approval—to July 10, 1960, subject to applicable decisions of the Comptroller General.

A Notification of Personnel Action in each case was executed on August 19 stating its effective date as July 10. No reason is given for the delay in effecting the promotions to grade GS-11, but we assume that administrative delay again was involved. Furthermore, we do not understand that any attempt was made to give retroactive effect to the promotions to grade GS-9 effective March 20, 1960 (eligibility therefor having been completed in December 1959).

We note that the two individuals were employed prior to the enactment of the Government Employees' Training Act, 72 Stat. 327, 5 U.S.C. 2301; therefore, the training agreement involved was not based upon specific statutory authority. Prior to the effective date of the Government Employees' Training Act, Chapter A6 of the Federal Personnel Manual contained instructions for the establishment of training agreements so as to authorize promotions of participating employees before they had completed one year in grade under section (c)(3) of the "Whitten Amendment," section 1310(c)(3) of the Supplemental Appropriation Act, 1952, 65 Stat. 758, 5 U.S.C. 43 note. We have some reservation as to whether the training agreement under which the promotions to grade GS-11 were made in this case was in accord in all respects with the spirit and intent of the "Whitten Amendment," namely, to restrict the rapid promotion of employees in the Government service. However, since we informally have ascertained from the Civil Service Commission that training agreements such as here have been superseded by other agreements which require a longer qualifying period for advancement in grade, no objection will be interposed on that basis to otherwise proper promotions in accordance with the qualification periods referred to herein.

It seems that the employees involved were hired with an oral understanding that they would be covered by the training agreement described above. Paragraph 4 of that agreement provides in part:

> *In order to keep faith with persons covered* by this training agreement, each promotion shall be made without delay and in accordance with the predetermined schedule. * * * [Italics supplied.]

Thus, both the conditions of employment and the wording of the training agreement show that no contractual obligation arose between the Government and the employees concerned. In other words, the matter of promotions under such an agreement is more in the nature of an agency policy rather than a firm commitment which would entitle the employees to promotions on the dates specified, regardless of delay in administrative action.

You cite the cases *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; and *Watson* v. *United States*, 142 Ct. Cl. 749, in support of the position that the Government was bound to promote the employees involved when they became eligible under the training agreement. Those cases hold that an agency which brings charges against an employee to separate him under valid departmental regulations must comply with the requirements of such regulations even though the application of those regulations is discretionary. We do not feel that the holdings in those cases require that the Administrator of the General Services Administration give promotions or confer on the employee a right to receive them exactly in accordance with the wording of a training agreement approved by the personnel divisions of his agency and the Civil Service Commission even though the Administrator has issued an order which provides that "accelerated development under appropriate training agreements" shall be part of a career management program within the Administration.

Furthermore, in the *Vitarelli* case, *supra*, at page 545, the court said:

> Because the proceedings attendant upon petitioner's dismissal from government service on grounds of national security fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was illegal and of no effect.

Certainly, there has been substantial compliance with the training agreement in both cases here in question.

It long has been the rule of our Office that a personnel action may not be made retroactively effective so as to increase the right of an employee to compensation. 39 Comp. Gen. 583; 33 *id.* 140. Therefore, the promotion actions approved by the Civil Service Commission are effective only from August 19, 1960, the date promotion action was taken.

The voucher which is returned herewith may be certified only in accordance with the foregoing holding.

[B-97225]

Compensation—Erroneous Rate—Retroactive Correction of Error

An employee who is qualified for and performs the duties of a position, but who, through administrative error, is not paid the lawful salary attaching to the position, may have his salary corrected retroactively by appropriate administrative action without such payment being regarded as a retroactive promotion such as ordinarily is prohibited by law.

Comptroller General Warren to the Secretary of the Navy, August 29, 1950:

Reference is made to your letter of July 28, 1950, requesting a decision as to whether the pay of a civilian employee may be corrected retroactively under the circumstances hereinafter set forth.

It is reported that the employee in question has been serving in the position of leadingman, mechanic, continuously since December 1947 and the preponderant group supervised by him since that date has been "Machinists." However, because of erroneous information appearing on a personnel form in August 1948, to the effect that the preponderant group supervised was "Riggers," the employee received the pay applicable to that group with the result that, in January 1949, when the rate of pay for rigger was fixed at three cents per hour below that of machinist, the employee was paid at a lower rate than that to which entitled.

The general rule is that where an incumbent of a position performs the duties thereof and is otherwise qualified to hold such position he is entitled to the salary established for the position, and when, through administrative error, he is not paid the lawful salary attaching thereto, a future payment of an amount to correct the error retroactively is not to be regarded as a retroactive promotion such as ordinarily is prohibited by law. Accordingly, under the circumstances stated, the salary of the employee may be corrected retroactively by appropriate administration action.

[B-96669]

Subsistence—Per Diems—Temporary Duty Station Subsequently Made Permanent

An employee performing official duties at a temporary station is entitled to per diem in lieu of subsistence at such place up to the date an official notice that the temporary station is to become his permanent station is communicated to him by